IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002668

First-tier Tribunal No: EU/50094/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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9th September 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

Xhevdet Darsi
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr J. Collins, Counsel instructed by Marsh & Partners
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 31 August 2023

DECISION AND REASONS

1. This is an appeal raising the issues addressed in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 ("*Celik (Court of Appeal)*").

2. By a decision promulgated on 23 June 2023 First-tier Tribunal Judge C. Scott ("the judge") dismissed an appeal brought by the appellant, a citizen of Albania, against a decision of the Secretary of State dated 20 July 2021 to refuse his application for pre-settled status under the EU settlement scheme ("the EUSS"). The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Buchanan.

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3. We informed the parties at the hearing that the appeal would be dismissed with written reasons to follow, which we now give.

Factual background and the decision of the First-tier Tribunal

4. The appellant is a citizen of Albania. He was born in 1980. On 29 September 2019, he arrived in the United Kingdom unlawfully and has remained here ever since. He began a relationship with a citizen of Romania, Ioana Tobosaru ("the sponsor"), and they made plans to get married in 2020. The Covid pandemic prevented their plans from being carried out at the time, and it was not until 19 April 2021 that the were able to get married. Meanwhile, the Brexit "implementation period" had come to an end, on 31 December 2020 at 11.00PM.

5. On 12 May 2021, the appellant applied for pre-settled status under the EUSS. The application was refused, and it was that refusal decision that was under appeal before the judge below.

6. The judge dismissed the appeal on three bases. First, the appellant was not a "family member of a relevant EEA citizen" since he had married the sponsor after the "specified date" of 31 December 2020 (para. 14). Secondly, he did not hold a "relevant document" issued under the Immigration (European Economic Area) Regulations 2016 as a "durable partner" and he was unaided by paragraph (b)(ii)(bb)(aaa) of the definition of "durable partner" ("the (aaa) issue"). Thirdly, (iii) he could not benefit from broader reliance on the principle of "proportionality" under the EU Withdrawal Agreement, pursuant to paragraph (2) of the headnote to *Celik*.

7. In reaching those conclusions, the judge applied *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC) ("*Celik UT*"). Shortly after the promulgation of her decision, the Court of Appeal heard the appeal in *Celik*. Its decision (which was handed down on 31 July 2023) was not available to Judge Buchanan when he granted permission to appeal by his decision dated 13 July 2023, but the fact it had been heard was the sole reason he gave for granting permission to appeal.

Issues on appeal to the Upper Tribunal

8. As originally formulated, there were three grounds of appeal:

   a. First, the judge adopted an overly prescriptive approach to the findings of *Celik – UT* in relation to the role of proportionality in decisions taken under the EUSS.

   b. Secondly, the judge erred by concluding that the Secretary of State did not err when failing to adopt a policy to make adequate provision for those whose immigration circumstances were impacted by Covid.

   c. Thirdly, the judge's approach to the (aaa) issue was wrong. The judge should have followed the unreported decision in *Kabir v Secretary of State for the Home Department* (UI-2022-002538) rather than, as she did, the contrasting unreported decisions in *Basha v Secretary of State for the Home Department* (UI-2022-003113) and *Drini v Secretary of State for the Home Department* (UI-2022-000383).

9. Very fairly, Mr Collins recognised that in light of *Celik (Court of Appeal)* at para. 81, the second ground of appeal fell away.

10. Similarly, Mr Collins did not pursue the third ground; he submitted that, although there was a lack of clarity from the Upper Tribunal in relation to the (aaa) issue, no longer sought to argue that the judge was wrong to follow the

approach adopted in *Basha* and *Drini*. We therefore need say no more about that issue.

11. Mr Collins's submissions remaining submissions were reasoned as follows:

a. It was wholly disproportionate for the appellant not to be granted leave to remain under the EUSS on account of matters that were outside his control, namely the impact of Covid. Had the pandemic not disrupted his plans, he and the sponsor would have been able to marry before the end of the "implementation period" at 11.00PM on 31 December 2020.

b. Article 18(1)(r) of the EU Withdrawal Agreement provides that decisions to refuse applications shall not be disproportionate.

c. The refusal decision therefore breached Article 18(1)(r) because it was disproportionate, in that it held against the appellant matters that were outside his control.

d. In *Celik – UT*, the Presidential panel appeared to preserve a role for the principle of proportionality, at paras 62 and 63. See para. 62, in particular:

> "The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions."

e. Although the headnote to *Celik – UT* implied that there was no role for the principle of proportionality, it was the body of the decision and its operative reasoning that the First-tier Tribunal should have followed.

f. The decision in *Celik – UT* was upheld on appeal. While the Court of Appeal adopted a restrictive approach to the principle of proportionality, it did not, in terms, criticise or otherwise overrule the approach of the Upper Tribunal at paras 62 and 63, which therefore remain good law.

g. Accordingly, there remains a role for the principle of proportionality in cases such as the present. The appellant is yet to have his case properly adjudicated by reference to that principle. It was an error of law for the First-tier Tribunal to decline to apply the principle of proportionality in his favour.

Celik: the appellant is not aided by Article 18(1)(r)

12. Mr Collins realistically accepted that his *Celik*-based submissions were "bold". We agree. Lewis LJ dealt with the role of proportionality in the following terms, at para. 56:

> "Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in Article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by Article 18(1) are not disproportionate. That status must ensure that EU citizens and United Kingdom nationals, and their respective family members and other persons may apply for a new residence status "which confers the rights under this Title". The

> principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. **The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.** The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i).” (Emphasis added)

13. It was not necessary for the Court of Appeal expressly to state with any further clarity that, whatever the Upper Tribunal meant at para. 62 of its judgment in *Celik – UT*, there was no role for the principle of proportionality in a situation such as that of the appellant in these proceedings.

14. The central point is that we have emphasised in the extract quoted above: “the principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.” No further clarity was needed in relation to the decision of the Upper Tribunal in *Celik*.

15. We therefore find that the judge in these proceedings did not err when she concluded, at paras 28 and 29, that the principle of proportionality did not assist an applicant, such as this appellant, whose residence as a durable partner was not facilitated before the end of the transition period, who did not apply for his residence to be facilitated before the end of the transition period, and who did not marry an EU citizen until *after* the EU rules concerning the free movement of persons had ceased to apply to the UK.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 September 2023